Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

QIAN GAO,

Petitioner,

v.

ALBERTO GONZALES, Attorney General

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Second Circuit Court of Appeals deny the petitioner his fundamental rights to due process under the Fifth Amendment by employing the fugitive disentitlement doctrine to summarily dismiss the petitioner's appeal of an agency finding in contravention of its own precedent and without considering the substantive underlying arguments, and thereby violate the petitioner's Eighth Amendment rights by exposing him to cruel and unusual punishment?

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Petitioner Qian Gao asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, *Gao v. Gonzales*, 481 F.3d 173 (2d Cir. 2007), is attached to this petition as Appendix A. The agency opinion issued by the Board of Immigration Appeals, *In re Qian Gao*, No. A73-573-380 (BIA September 12, 2005), is attached hereto as Appendix B.

STATEMENT OF JURISDICTION

The Court of Appeals for the Second Circuit entered its judgment on March 20, 2007. The Court of Appeals denied Mr. Gao's timely petition for review of the decision of the Board of Immigration Appeals on March 20, 2007. The order denying review of the agency appeal is attached hereto as *Appendix A*. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. § 1254, as the decisions below served to deprive Mr. Gao of his rights as granted under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Central to the matter *sub judice* are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, which Amendment states, in pertinent part, that "No person . . . shall be deprived of life, liberty, or property, without due process of law."

The decision of the Court below also invokes the Eighth Amendment to the Constitution of the United States, which states, in whole, that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

The gravamen of the instant petition lies in the Court of Appeals' improper application of the fugitive disentitlement doctrine as a dispositive tool with which it wholly and summarily dispelled any consideration of the merits of Mr. Gao's argument on appeal, which decision is in contravention of its own precedent. The Court of Appeals' decision is therefore arbitrary, capricious, and a clear violation of Mr. Gao's Fifth Amendment rights. The decision below also exposes Mr. Gao to the certainty of cruel and unusual punishment in violation of the Eighth Amendment. A concise statement of the case's history and underlying facts is herein provided so as to set forth the grave repercussions of the decision below.

Mr. Gao was placed in removal proceedings before the Honorable Patricia A. Rohan, who denied his application for asylum and withholding of removal under sections 208(a) and 241(b) of the Immigration and Nationality Act, codified at 8 U.S.C. §§ 1158(a) and 1251(b), respectively. He appealed Judge Rohan's denial of relief to the Board of Immigration Appeals, which dismissed his appeal on December 30, 1996. The Immigration and Nationality Service alleges that it issued a notice for Mr. Gao to surrender himself for deportation (colloquially termed a "bag-and-baggage letter"), which Mr. Gao never received. After remaining in the U.S. as a tax-paying, law-abiding member of the community, Mr. Gao

married, subsequently fathering two American-born children. Mr. Gao later moved the Board of Immigration Appeals to reopen his removal proceedings on the basis of newly-discovered, previously unavailable evidence. The Board of Immigration Appeals denied Mr. Gao's motion on September 12, 2005, on primarily procedural grounds, without offering a comprehensive analysis of the merits of his argument. *See Appendix B*. Mr. Gao appealed the Board of Immigration Appeals decision to the Court of Appeals for the Second Circuit, which followed in kind, denying Mr. Gao's appeal on wholly procedural grounds, declining to reach the merits of his case. *See Appendix A*. Petitioner thus submits this timely petition for this Honorable Court's entry of a writ for review of the decision below.

Mr. Gao arrived in the United States from the Fujian Province of China. While in the United States as a tax-paying member of the community, Mr. Gao courted and married, and thereafter fathered two U.S.-born children. Aware of the bestial means and unyielding manner in which the Chinese government enforces its coercive population control policy Mr. Gao, for the sake of himself and his family, petitioned the Board of Immigration Appeals to reopen his removal proceedings on the basis of his subjectively held and objectively reasonable fear of persecution and the likelihood of his torture were he to return to the Fujian Province as a violator of China's coercive population control policy. Under China's coercive policy, persons who have borne children without the express permission of the Chinese government are regularly made subject to involuntary sterilizations and abortions (which occur as late as the third trimester), exorbitant fines, imprisonment and torture therein. *See* U.S. House of Representatives, Committee on International Relations, *Coercive Population Control in China: New*

Evidence of Forced Abortion and Forced Sterilization, 107th CON. (October 17, 2001); *see also* U.S. House of Representatives, Committee on International Relations, Subcommittee on International Operations and Human Rights, *Statement of Gao Xiao Duan, Planned-Birth Officer*, 104th CON. (June 10, 1998).

The Court of Appeals for the Second Circuit arbitrarily applied the fugitive disentitlement doctrine to Mr. Gao's matter, after previously remanding like matters with similar underlying factual bases to the Board of Immigration Appeals for review of the merits of the substantive claim. *See Zhang v. Gonzales*, 481 F.3d 867 (2d Cir. 2006). In *Zhang*, decided only a few months prior to the Court's decision below, the Court of Appeals for the Second Circuit granted the petition for review of an order of the Board of Immigration Appeals. *Id.* The petitioner in that matter submitted a motion to reopen his removal proceedings after not challenging an *in absentia* order of removal entered almost eight years prior. The Court, on its own discretion, remanded the matter to the BIA for a decision on the merits of the petitioner's substantive claims in light of newly-obtained documents which "provide for the first time evidence of *an official policy of forced sterilization* in Changle City, Fujian Province, from which [the petitioning alien] comes." *Id.* (Emphasis added). As stated above, and undisputed in the record, Mr. Gao hails from the Fujian province of China, and like the alien in the *Zhang* matter, fathered two U.S.-born children, in violation of China's coercive population control policy. The Court of Appeals for the Second Circuit, however, seemingly failed to remember the newly-documented evidence which it referenced in the *Zhang* decision, which it claims may finally concretely *prove* the existence of a *policy* of involuntary sterilization in place in the province from which Mr. Gao hails. A decision by the lower tribunal in the *Zhang* matter remains pending.

Mr. Gao hereby asserts that the Court of Appeals for the Second Circuit, in contravention of its own precedent, violated his Fifth Amendment rights to due process of law by summarily dismissing his matter under the arbitrary implementation of the fugitive disentitlement doctrine. Also, in light of the Court's own admission of the possibly authentic evidence proving the existence of a mandatory policy of involuntary sterilization under the coercive population control policies in place in China, and their dismissal or Mr. Gao's claim (effectively making the order of removal to China the last and controlling order), the Court of Appeals violated the protections of the Eighth Amendment by knowingly ordering Mr. Gao removed to a country in which it is more than likely that he will suffer cruel and unusual punishment under a mandatory policy.

REASONS FOR GRANTING THE PETITION

A. The fugitive disentitlement doctrine is employable primarily in the context of criminal law, and its groundless employ in the context of immigration law by the Court of Appeals for the Second Circuit, while discretionary, was inappropriate and arbitrary.

1. The fugitive disentitlement doctrine was borne out of and developed as a tool to aid in the swift adjudication of criminal matters.

The fugitive disentitlement doctrine is a long-wielded tool of the judiciary that was forged by this Honorable Court for the purpose of ensuring the enforceability of judgments in appeals brought by convicted felons. *See* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. Rev. 667, 744 (2003). In seminal precedent, this Court noted

its clear discretion to employ the doctrine to dispose of a *criminal* case, stating its right to dismiss appeals brought from criminal convictions "unless the *convicted* party . . . is where [he] can be made to respond to any judgment we may render." *See Smith v. United States*, 94 U.S. 97 (1876) (Emphasis added). Indeed, even in this Court's explanation of its several rationales behind the enforcement of the doctrine, almost a century later, it clothed it's reasoning in the language of the criminal law. *See Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) ("No persuasive reason exists why this Court should proceed to adjudicate the merits of a *criminal case* after the *convicted* defendant . . . escapes from the restrains placed upon him pursuant to the *conviction*.") (Emphasis added). Thus it is clear, even from this Honorable Court's own precedent, that the doctrine was intended as a tool with which to disentitle persons who have either pled to or been found guilty of a *criminal* violation of the various federal or state criminal codes, and who have fled from the exacting of justice during the pendency of an appeal of the underlying "guilty" verdict.

As this Court has laid the foundation and the framework within which the fugitive disentitlement doctrine can be applied, it has also meticulously discussed the inappropriate discretionary application of the doctrine in certain circumstances, and plainly prohibited its use in others. *See Degen v. United States*, 517 U.S. 820 (1996). In *Degen*, this Court found that the extension of the doctrine for application in a civil matter inextricably tied to the underlying criminal matter was unjustified. *Id.* Specifically, this Court found disentitlement to be an unjustified measure when a court's jurisdiction is "secure", and there is "no risk of delay or frustration in determining the merits" of the claim. *Id.* at 835. What must also be noted is this Court's

requirement in discouraging the use of the catch-all doctrine that the judgment entered be practically enforceable so as to not waste judicial resources on unenforceable judgments. *Id.* The civil matter in which the government in *Degen* sought to attach the doctrine was the forfeiture of properties allegedly procured with monies earned from the alien petitioner's international narcotics trafficking, the prosecution of which he escaped by fleeing to Switzerland, a country which would not extradite him to the U.S. to face criminal prosecution. *Id.* Still, this Honorable Court found that the lower court had the judicial resources and legal tools with which to manage the underlying claims without resorting to the sweeping solution of the fugitive disentitlement doctrine. *Id.* at 826.

The Petitioner argues that if this Court found the doctrine inapplicable in *Degen*, then its application by the Second Circuit Court of Appeals in his matter was all the more erroneous. Primarily, Mr. Gao has been neither charged, tried, nor adjudicated as a criminal, and therefore the doctrine does not apply in the instant matter. Though this Court has granted discretion to the federal district and circuit courts to warily employ the use of the fugitive disentitlement doctrine, it has not granted *carte blanche* for the doctrine's use in every context in which a person seeking a remedy from the Courts is considered "absent" during the adjudication of their petition. *See Id.* at 823. As such, no grounds exist upon which the use of the doctrine should be allowed in the context of civil immigration law. Though a finding of removability can be made during the proceedings of an undocumented alien seeking relief from U.S. Courts, removal proceedings are absent a "guilt" phase which would indisputably determine any actual *criminal* violation. Therefore, the use of the fugitive disentitlement doctrine in the context of the

immigration law by the Second Circuit Court of Appeals for the sole purpose of the arbitrary dismissal of an alien's appeal after the entry of an order of removal is groundless, and constitutes an abuse of discretion reviewable by this Honorable Court.

2. The Court of Appeals for the Second Circuit arbitrarily applied the fugitive disentitlement doctrine.

The Petitioner respectfully contends that the Court of Appeals for the Second Circuit arbitrarily and erroneously applied the fugitive disentitlement doctrine in the instant matter. The Court has employed its supervisory powers to create its own definition of the term "fugitive" outside of that generally accepted. It has extended the term beyond its intended criminal context for the sole self-serving purpose of providing a vehicle for its arbitrary application of the fugitive disentitlement doctrine, amounting to a reversible abuse of discretion. Also – as will be argued *post* – the Court of Appeals for the Second Circuit has entered precedent in which it has remanded to the Board of Immigration Appeals for further proceedings, matters in which the factual basis mirrors that of the Petitioner, making the use of the doctrine in this instance arbitrary and capricious.

This Honorable Court has found that the federal circuit courts of appeals have the supervisory powers to propagate procedural rules with which to manage litigation brought before them. *See Thomas v. Arn*, 474 U.S. 140, 146 (1985). This Honorable Court has even found such exercise of power by the courts of appeals "desirable", when it results in "sound judicial practice." *Id.* (citing *Cupp v. Naughten*, 414 U.S. 141, 146 (1973)). Even still, this Court stated that when such

exercise of power gives rise to rules or procedures that are unconstitutional or in contravention of well-settled statutes, even if such rules or procedures represent a "sensible and efficient" use of that supervisory power, then the rule or provision must be reviewed by this Court. *Id.* at 148. This Court's review of procedures or rules is borne from the attempt to avoid conferring on the judiciary "discretionary power to disregard the considered limitations of the law it is charged with enforcing." *U.S. v. Payner*, 447 U.S. 727 (1980).

The Court of Appeals for the Second Circuit has broadened its use of the term "fugitive" to such an extent in employing the fugitive disentitlement doctrine that its use deprives aliens in removal proceedings of the opportunity to fully exercise due process guarantees afforded them. In truth, the Court of Appeals for the Second Circuit has acknowledged that the term "fugitive" (as it is universally understood) implies that at some point previous to the attachment of the moniker, the person referenced had to have at least been properly accused of committing a crime, and fled from the reach of the Courts at some point during or after the guilt phase of the ensuing criminal proceedings. *See Bar-Levy v. U.S. Dep't. of Justice, INS*, 990 F.2d 33, 35 (2d Cir. 2003). In fact, the Court acknowledged that "the 'paradigmatic object of the [fugitive disentitlement] doctrine is the convicted criminal who flees while his appeal is pending.'" *Degen*, 517 U.S. at 823 (citing *Antonio-Martinez v. INS*, 317 F.3d 1089, 1092 (9th Cir. 2003)). The same august tribunal has also noted, in its decision below, its right to employ the fugitive disentitlement doctrine at its discretion when presented with an appeal by a fugitive. *See Gao v. Gonzales*, 481 F.3d 173, 175 (2d Cir. 2007) (citations omitted). It is undisputed, this Honorable Court has unambiguously granted to the circuit courts the right to

employ the fugitive disentitlement doctrine at their individual discretion, but only in *criminal* matters in which the accused or convicted criminal seeks relief from the Courts, and has absconded from justice during the pendency of their petition. *See specifically Ortega-Rodriguez v. United States*, 507 U.S. 234, 239 (1993); *see also Degen*, 517 U.S. at 823.

Nevertheless, the Court of Appeals for the Second Circuit chose to extend the definition of "fugitive" beyond its actual meaning, and for application outside of its appropriate and intended context, including in its newly-developed umbrella definition aliens in immigration proceedings. *See Bar-Levy*, 990 F.2d at 35. Moreover, the Court of Appeals for the Second Circuit further expounded upon its adulteration of the definition of "fugitive" by stating that even aliens whose home address *and* place of employment are known to the government will be considered fugitives for the purposes of the employment of the fugitive disentitlement doctrine. *Gao*, 481 F.3d at 186. This definition of "fugitive" is not only overbroad and a clear abuse of judicial discretion, but it is quite literally antithetical to the term "fugitive" as it is generally understood. The definition posited by the Court below completely discards the "flight" element by stating that even if it is known where an alien in immigration proceedings continues to both live *and* work, if *any* "governmental resources" have to be used in bringing them physically within the custody of the Immigration and Naturalization Service, they will be considered a "fugitive," despite the fact that they have committed no crime, and have not absconded from justice or even *attempted* to flee.

What bears noting also is the fact that the definition of "fugitive" set forth by the Court of Appeals for the Second Circuit has no time element. To be fair, this occurrence is

most likely accredited to the fact that under the Second Circuit's definition of a fugitive, one need not be found guilty to be *considered* guilty, and one does not actually have to flee to be labeled as having fled from the jurisdiction of the Courts. As a result, imposing a temporal element as to the time of the actual flight from justice becomes an increasingly difficult hurdle to overcome. Indeed, under the Second Circuit's definition, aliens who have overstayed removal orders and are yet to appeal, or whose attorneys are in the preparatory stages of appealing when "found," as well as aliens who may have never received the "bag-and-baggage' orders through some error not their own (as in the instant matter), are all swept under the same umbrella definition with persons who knowingly and purposefully commit and are convicted of felonies, and who later appeal those convictions and flee not only the jurisdiction in which the crimes occurred, but the country in its entirety.

Plainly, the definition created and employed by the Court of Appeals for the Second Circuit is overbroad, engineered specifically to allow the Court to employ a doctrine whose creation and intent was never within the context of immigration. The Court has exercised its supervisory powers to create a rule that is neither "sensible" nor "efficient", and which does not result in "sound judicial practice." *See Thomas v. Arn*, 474 U.S. 140, 146 (1985). Thus, the use of the fugitive disentitlement doctrine by the Court below, which was only possible as a result of the contrivance of an overbroad definition, represents an unchecked abuse of discretion which calls for this Honorable Court's review.

B. This Honorable Court should grant certiorari as the Court of Appeals for the Second Circuit has arbitrarily and capriciously denied Mr. Gao's appeal under the fugitive disentitlement doctrine in contravention of its own applicable precedent.

In the event that this Honorable Court does not find that the Court of Appeals for the Second Circuit abused its discretion in both its expanse of the definition of a "fugitive," and its resultant broadened application of the fugitive disentitlement doctrine, this Honorable Court should review the decision below for arbitrariness and capriciousness, as the decision below was entered in contravention of the Court's own precedent. Specifically, Petitioner recalls this Honorable Court's attention to *Zhang v. Gonzlaes*, 481 F.3d 867 (2d Cir. 2006), mentioned *supra*. That matter, decided only a few months preceding the Court of Appeals for the Second Circuit's decision in the instant matter, presented the Court of Appeals for the Second Circuit with – for the first time possibly authentic documented proof that there is actually in place in the Fujian province a policy of mandatory sterilization for Chinese nationals who have given birth to foreign-born children without permission of the Chinese government. *Id.*; *see also Shou Yung Gao v. Gonzales*, 463 F.3d 109 (2d Cir. 2006). On the basis of this *possibility*, the Court of Appeals remanded the record to the Board of Immigration Appeals for validation of the documentation and further proceedings in accordance with its order. *Id.*

Petitioner argued in his brief in support of appeal to the Court of Appeals for the Second Circuit that the Board of Immigration Appeals failed to consider the record as a whole when reviewing his appeal. He argued that country reports within the record were consistent with his claims, and showed

a likelihood of his persecution and/or torture under China's coercive population control policy were he made to return to China. He cited to precedent entered by the Court of Appeals for the Second Circuit which stated that when there is evidence in the record that was not considered by the Board of Immigration Appeals in its decision, then the matter must be remanded to the Board for further proceedings. *See Blanco v. INS*, 68 F.3d 642 (2d Cir. 1995); *see also Romero-Morales v. INS*, 25 F.3d 125 (2d Cir. 1994). On appeal, the Court of Appeals for the Second Circuit employed the fugitive disentitlement doctrine to dismiss the appeal without reaching the merits, in spite of its knowledge of the documentation submitted in *Zhang* which – as yet to have been proven as inaccurate – ensures that the Petitioner would be subjected to the very torture and persecution from which he was seeking relief. Thus, the Court of Appeals for the Second Circuit chose to arbitrarily apply an improperly extended doctrine to dismiss the Mr. Gao's claims for relief without reaching the merits of the claim, ushering him into the hands of those from whom he sought protection. Therefore this Honorable Court should grant certiorari in this matter.

C. The Court of Appeals for the Second Circuit has proof that persons in Mr. Gao's circumstances face torture and persecution if returned to China, and the Court's failure to address the merits of his claim in light thereof constituted violations of both the Fifth and Eight Amendments to the Constitution.

The Fifth Amendment to the Constitution grants, in pertinent part, due process of law before a person can be deprived of life, liberty or property. *See* U.S. Const., Fifth Amend. The Eighth Amendment to the Constitution provides that no cruel and/or unusual punishment will be inflicted.

See U.S. Const., Eighth Amend. It is well established that this Honorable Court has extended Fifth Amendment guarantees of the due process of law to aliens in removal proceedings. *See Reno v. Flores*, 507 U.S. 292, 307 (1993); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). At stake in removal proceedings is the potential deprivation of a significant, constitutionally protected liberty interest, and often – more poignantly – the very life and freedom of the petitioning aliens. Accordingly, removal proceedings must be conducted in a manner which upholds the principles of fundamental fairness and substantial justice. *See Bridges v. Wixon*, 326 U.S. 135 (1945); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Ng Fung Ho v. White*, 259 U.S. 276 (1922). By arbitrarily and capriciously employing the improperly expanded and inappropriately applied fugitive disentitlement doctrine to dismiss his appeal without reaching the merits of the underlying claims, the Court of Appeals for the Second Circuit denied Mr. Gao his fundamental rights to due process of law.

Equally, the Court of Appeals for the Second Circuit ordered Mr. Gao removed to China despite recently obtaining information on the mandatory policy of sterilization in the Fujian province of China, from where Mr. Gao hails. The Court of Appeals for the Second Circuit deemed the documentation credible enough to effect a remand to the Board of Immigration Appeals in one matter, and insignificant enough for the Court to not even have to reach the merits of the claim before dismissing the appeal in Mr. Gao's matter. In essence, the order of the Court of Appeals dismissing Mr. Gao's appeal assured his exposure to cruel and unusual punishment at the hands of the Chinese government, punishment from which the Court of Appeals had the authority and power to deliver Mr. Gao.

Based on the Court of Appeals' denial and violation of Mr. Gao's Fifth and Eighth Amendment rights, this Honorable Court should grant certiorari in this matter.

D. The Federal Circuit Courts of Appeals are not in agreement with the use of the fugitive disentitlement doctrine as applicable in the context of immigration proceedings, thus presenting a federal question reviewable by this Honorable Court.

The Federal Circuit Courts of Appeals are not united in their application of the fugitive disentitlement doctrine in immigration proceedings, presenting a federal question for review by this Honorable Court. A majority of the Circuit Courts of Appeals are unified in their finding the fugitive disentitlement doctrine appropriate for application in immigration proceedings. *See Antonio-Martinez*, 317 F.3d 1089 (9th Cir. 2003); *Arana v. U.S. INS*, 673 F.2d 75 (3d Cir. 1982); *Garcia-Flores v. Gonzales*, 477 F.3d 439 (6th Cir. 2007); *Sapoundjiev v. Ashcroft*, 376 F.3d 727 (7th Cir. 2004); *Gao v. Gonzalez*, 481 F.3d 173 (2d Cir. 2007). However, the Court of Appeals for the Eighth Circuit has refused to apply the fugitive disentitlement doctrine in an instance in which an alien was ordered removed, left the country, and continued to petition the courts for relief. *See Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007). Thus, by granting certiorari in this matter, this Honorable Court can settle the question of the applicability of the fugitive disentitlement doctrine in the immigration context by the federal Circuit Courts of Appeal.

CONCLUSION

For the reasons set forth above, this Honorable Court should grant certiorari and schedule this matter for briefing and oral argument to ensure Mr. Gao the opportunity to have the merits of his meritorious appeal reviewed by the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MARCH 20, 2007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 05-5013-ag

QIAN GAO,

Petitioner,

v.

ALBERTO GONZALES, Attorney General,

Respondent.

Argued September 12, 2006
Decided March 20, 2007

OPINION

CARDAMONE, *Circuit Judge*.

This is an appeal from the denial by the Board of Immigration Appeals of petitioner's motion to reopen his proceedings. The petitioner is now a fugitive, and because of that status is subject to having his appeal dismissed under the fugitive disentitlement doctrine. In a number of contexts, it is established that litigants who flee the reach of the courts risk losing the right of access to them. A criminal defendant who fails to appear at trial risks being tried *in absentia*; a litigant who fails to timely respond to a civil suit risks default

judgment; on similar reasoning, an alien who fails to comply with a notice to surrender for deportation risks losing the right to appeal that deportation.

Qian Gao (Gao or petitioner) petitions for review of a September 12, 2005 order of the Board of Immigration Appeals (BIA or Board) denying, as untimely, his motion to reopen his removal proceedings. On May 14, 1996, Immigration Judge Patricia A. Rohan (IJ) denied Gao's application for asylum and withholding of removal based on her finding that he lacked credibility and had failed to provide sufficient corroboration for his claims of persecution. The BIA summarily dismissed the appeal for failure to file a brief on December 30, 1996. Although Gao was granted 30 days from the date of the BIA's order to depart the country voluntarily, he failed to do so, and subsequently he ignored a lawful order issued on December 12, 1997 to surrender for deportation.

For the past ten years, Gao has continued to live in the United States illegally and to this day has failed to comply with the order to surrender to immigration authorities. He now seeks to reopen his asylum application, alleging changed country circumstances and the existence of previously unavailable material evidence. The BIA denied the motion to reopen as untimely under 8 C.F.R. § 1003.2(c)(2), because petitioner had not established changed country circumstances, which would render timeliness immaterial under 8 C.F.R. § 1003.2(c)(3)(ii). Gao now petitions this Court for review of the BIA's order and decision. Using our equitable discretion under the fugitive disentitlement doctrine, we dismiss the petition.

Appendix A

BACKGROUND

The facts in this case are straightforward and largely uncontested. Gao is a 36-year-old male from Fujian province in the People's Republic of China (China). Twelve years ago on November 9, 1994 he entered the United States illegally near Miami, Florida. Shortly after entering the country, Gao filed an application for asylum and withholding of removal in which he claimed he had been repeatedly persecuted in China because of his Buddhist religious beliefs.

Petitioner's application for asylum and withholding of removal was denied by the IJ in her May 14, 1996 oral decision. The IJ found Gao had failed to provide a consistent account of the events leading up to his departure from China and had not provided any corrobative evidence of his claims of persecution. After the BIA dismissed Gao's appeal on December 30, 1996, petitioner was granted 30 days from the date of the BIA order to depart the country voluntarily or else be deported. The BIA's decision was not appealed.

Subsequent to these proceedings, Gao did not depart the country voluntarily. Immigration officials sent him a notice to surrender for deportation (often called a bag-and-baggage letter) dated December 12, 1997, and petitioner signed a domestic return receipt form acknowledging receipt of this notice on January 12, 1998. The notice directed Gao to report for custody and removal on January 22, 1998. Nonetheless, he never reported for custody. For the next seven years, Gao neglected to contact immigration authorities. We now learn that during this time he married and had two children. In other words, petitioner continued to carry on his life in

complete disregard of the outstanding bag-and-baggage letter and deportation order against him.

On July 1, 2005 petitioner filed with the BIA the motion that is the subject of his appeal. He asserts the birth of his two children in the United States puts him and his family at risk of persecution under China's family planning policy. Although motions to reopen ordinarily must be filed within 90 days of the entry of the final administrative decision, 8 C.F.R. § 1003.2(c)(2), Gao claims the 90-day time limit does not apply to him because he has produced evidence of changed country circumstances in China and therefore falls under the exception in 8 C.F.R. § 1003.2(c)(3)(ii). The BIA denied the motion to reopen, and Gao has appealed.

DISCUSSION

The Fugitive Disentitlement Doctrine

A. *General Principles*

The fugitive disentitlement doctrine is an equitable doctrine that provides courts with discretion to dismiss the appeal of a defendant or petitioner who is a fugitive from justice during the pendency of the appeal. First applied by the Supreme Court in the late nineteenth century, *Smith v. United States*, 94 U.S. 97, 24 L.Ed. 32 (1876), the doctrine is now well established. *See, e.g., Ortega-Rodriguez v. United States*, 507 U.S. 234, 239, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993) ("It has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal.");

Estelle v. Dorrough, 420 U.S. 534, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975) (per curiam) (noting state disentitlement statute providing for automatic dismissal of appeals by defendants who escape during pendency of appeal and do not return within ten days); *Eisler v. United States*, 338 U.S. 189, 190, 69 S.Ct. 1453, 93 L.Ed. 1897 (1949) (per curiam) (removing case from docket because petitioner fled country); *see also Degen v. United States*, 517 U.S. 820, 823, 116 S.Ct. 1777, 135 L.Ed.2d 102 (1996) ("We have sustained, to be sure, the authority of an appellate court to dismiss an appeal or writ in a criminal matter when the party seeking relief becomes a fugitive.").

While the "paradigmatic object of the doctrine is the convicted criminal who flees while his appeal is pending," *Antonio-Martinez v. INS*, 317 F.3d 1089, 1092 (9th Cir.2003), we have also long held that the doctrine applies with full force to an alien who fails to comply with a notice to surrender for deportation, *see Bar-Levy v. U.S. Dep't of Justice, INS*, 990 F.2d 33, 35 (2d Cir.1993). Like the criminal defendant fleeing after his conviction, an alien who fails to comply with an outstanding notice to surrender is a fugitive from justice. *See id.* (holding that the alien became a fugitive upon failing to comply with a notice to surrender for deportation). We have previously observed that an alien may be a fugitive even if his home address and place of employment are known to authorities. *Ofosu v. McElroy*, 98 F.3d 694, 700 (2d Cir.1996). This is because "the INS must deploy resources to bring him in. And, of course, he may not be so easy to find once his litigation options are exhausted." *Id.* Thus, for an alien to become a fugitive, it is not necessary that anything happen other than a bag-and-baggage letter be

issued and the alien not comply with that letter. "Everyone understands that the [government] is overwhelmed with petitioners and procedures, and that it heavily relies on the word and voluntary compliance of numerous aliens within our borders. It is easy to game this system, but we should not treat disregard of [government] directives as a norm. . . ." *Id.* at 702-03. Applying the fugitive disentitlement doctrine to fugitive aliens accords with the approach taken by every circuit that has considered the issue. *See Sapoundjiev v. Ashcroft*, 376 F.3d 727, 728-29 (7th Cir.2004); *Antonio-Martinez*, 317 F.3d at 1092; *Arana v. INS*, 673 F.2d 75, 77 (3d Cir.1982) (per curiam).[1]

We have articulated several reasons why the inherent power of the court to manage its own affairs should be used to dismiss an appeal of a party who is a fugitive during the pendency of the appeal. *See Empire Blue Cross & Blue Shield v. Finkelstein*, 111 F.3d 278, 280 (2d Cir.1997). Those reasons include the difficulty of enforcing any judgment rendered against a fugitive; the need for a sanction to redress the fugitive's affront to the dignity of the judicial process; the desire to promote the efficient operation of the courts by deterring escape; and finally, the need to redress any prejudice to the government occasioned by the fugitive's absence. *See id.* When a litigant becomes a fugitive during the pendency of an appeal to escape the effect of judgment, we have observed that any one of these rationales provides a

1. The Sixth Circuit also has applied the fugitive disentitlement doctrine in the immigration context but not yet in a published decision. *See Qui Jin Chen v. Gonzales*, 187 Fed.Appx. 502, 504 (6th Cir.2006) (unpublished); *Kacaj v. Gonzales*, 163 Fed.Appx. 367, 368 (6th Cir.2006) (per curiam) (unpublished).

sufficient basis for us to dismiss the appeal. *United States v. Awadalla*, 357 F.3d 243, 247 (2d Cir.2004).

The Supreme Court in *Degen* ruled that two of these rationales-imposing a penalty for flight and deterring future flight-do not support dismissal of a civil litigant's appeal due to his fugitive status in a separate criminal matter. *Degen*, 517 U.S. at 828-29, 116 S.Ct. 1777. The Court noted that the sanction of disentitlement is "most severe" and, if applied too freely, "could disserve the dignitary purposes for which it is invoked." *Id.* at 828, 116 S.Ct. 1777. Applying the fugitive disentitlement doctrine too liberally-for example, to bar a criminal fugitive from defending his property in a civil forfeiture action-is inappropriate because it is "an arbitrary response to the conduct it is supposed to redress or discourage," and in that way erodes the respect due the court's judgments, upon which the dignity of a court depends. *Id.* *Degen* therefore suggests that, when considering whether to disentitle a criminal fugitive from appearing in a separate civil appeal, the most persuasive justifications to do so are (1) to promote the enforceability of decisions rendered by the appellate court and (2) to avoid prejudice to the other party resulting from the litigant's fugitive status. *SEC v. Berger*, 322 F.3d 187, 192 (2d Cir.2003).

While the punitive and deterrent purposes of disentitlement are discounted when a criminal fugitive seeks to appeal in a separate civil matter, they remain important considerations when a litigant becomes a fugitive to escape judgment in the very matter on appeal. *See Awadalla*, 357 F.3d at 246 (post-*Degen* decision considering each of the rationales underlying the fugitive disentitlement doctrine in

dismissing the appeal of a criminal defendant who fled during the pendency of his appeal). Litigants who abscond in the midst of an ongoing appeal defy the authority of the very court from which they seek relief. *Id.* Disentitlement is an appropriate sanction for such litigants because their flight is "calculated to disrupt the very appellate process which they themselves have set in motion." *See Estelle*, 420 U.S. at 541-42, 95 S.Ct. 1173; *see also Ortega-Rodriguez*, 507 U.S. at 246, 113 S.Ct. 1199 ("We have no reason here to question the proposition that an appellate court may employ dismissal as a sanction when a defendant's flight operates as an affront to the dignity of the court's proceedings.").

Rather than being "an arbitrary response to the conduct it is supposed to redress or discourage," *Degen*, 517 U.S. at 828, 116 S.Ct. 1777, disentitling a fugitive from appealing a judgment that he has fled sends a clear message to similarly situated litigants-flee the effect of a judgment and the privilege of challenging that judgment vanishes with you. *See Ortega-Rodriguez*, 507 U.S. at 247, 113 S.Ct. 1199 (noting that "[o]nce jurisdiction has vested in the appellate court . . . dismissal may be an appropriate sanction by which to deter"). When an appellant or petitioner is a fugitive from the very judgment that is the subject of the appeal, we therefore consider all the rationales that underlie the fugitive disentitlement doctrine.

B. *Doctrine's Application to This Case*

Gao's continued failure to surrender to immigration officials renders him a fugitive from justice. It is therefore within our discretion under the fugitive disentitlement doctrine to dismiss his appeal.

Appendix A

Applying the fugitive disentitlement doctrine to dismiss Gao's appeal furthers each of the rationales underlying the doctrine. First, Gao's fugitive status means that there is no assurance that any decision or order we render against him will be enforced. The gravamen of his petition is the posture of "heads I win, tails you'll never find me." *Antonio-Martinez*, 317 F.3d at 1093. Second, Gao's failure to report for custody throughout the duration of this appeal undercuts the authority and dignity of the judicial process. Disentitlement is an appropriate sanction where, as here, the petitioner disdains the authority of the court in the very matter in which he seeks relief. *Awadalla*, 357 F.3d at 246. Third, dismissing Gao's appeal will promote the efficient operation of the courts by preserving judicial resources and deterring similarly situated petitioners from fleeing justice.

Fourth, and finally, there is no doubt that allowing Gao to proceed with this appeal despite his fugitive status will unduly prejudice the government. Petitioner asserts that his marriage and the birth of his two children in the United States constitute changed circumstances sufficient to warrant reopening his motion for asylum and withholding of removal. While we do not reach the merits of this argument, we note that it rests largely on events of his own making that transpired while he was a fugitive. Allowing his motion to reopen to go forward would have the perverse effect of encouraging aliens to evade lawful deportation orders in the hope that, while they remain fugitives, they may contrive through their own efforts a new basis for challenging deportation. *See Wei Guang Wang v. BIA*, 437 F.3d 270, 274 (2d Cir.2006) ("[I]t would be ironic, indeed, if petitioners . . . who have remained in the United States illegally

following an order of deportation, were permitted to have a second and third bite at the apple simply because they managed to marry and have children while evading authorities.").

The fugitive disentitlement doctrine is discretionary. *See Esposito v. INS*, 987 F.2d 108, 110 (2d Cir.1993). However, there are no circumstances here militating against applying the doctrine of dismissal. Gao fails to offer any explanation whatsoever for his fugitive status. Thus, having been presented with no reason to overlook petitioner's fugitive status and reach the merits of his petition, we decline to do so. Instead, we dismiss petitioner's appeal. By dismissing his appeal asking us to review the Board's denial of his motion to reopen removal proceedings, we discourage petitioners from fleeing to evade the finality of a lawful deportation order and the removal to come.

CONCLUSION

For the reasons stated above, Gao's petition for review is dismissed.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW DATED SEPTEMBER 12, 2005

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: SEP 12 2005

File: A73 573 380 - New York

In re: QIAN GAO

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Alexander Kharash, Esquire

ON BEHALF OF DHS:
Leslie S. Evans
Assistant Chief Counsel

APPLICATION: Reopening

This matter was last before us on December 30, 1996, when we dismissed the respondent's appeal from an Immigration Judge's order finding the respondent deportable as charged, and denying his application for asylum and withholding of deportation. The respondent now moves that

we reopen proceedings for consideration of evidence of changed personal circumstances and of changed circumstances in his native China. He also seeks to apply for relief under the Convention Against Torture (CAT) on the basis of circumstances that have arisen subsequent to the hearing. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) opposes the motion. The respondent's motion will be denied.

The respondent's motion to reopen has been filed out of time. The final order in these proceedings was entered by the Board on December 30, 1996. Pursuant to 8 C.F.R. § 1003.2(0(2), a motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. In the instant case, the Board did not receive the respondent's motion until July 5, 2005, which is clearly more than 90 days after the December 30, 1996, order. The motion is thus untimely. In so far the respondent seeks reopening to pursue relief under the CAT, the motion has likewise been filed out of time. Specifically, the respondent's order of deportation became final before March 22, 1999. Thus, the deadline for filing a motion to reopen seeking relief under the CAT was June 21, 1999. *See* 8 C.F.R. § 1208.18(b)(2). Moreover, in so far the respondent's motion to reopen involves a claim for asylum based on opposition to China's coercive population control policies, having filed such motion more than 90 days after July 9, 2002, the respondent's motion is also untimely. *See Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002).

Appendix B

The respondent indicated that he was married in August 2000, and that he now has two United States born children (born in March 2001 and May 2005). As such, the respondent claims that he now has a well-founded fear of persecution in his native China on account of his opposition to that country's coercive population control policies. The respondent submitted various evidence including articles on the subject of China's coercive population control policies. The respondent claims that his untimely motion to reopen should be considered under 8 C.F.R. § 1003.2(c)(3)(ii). However, coercive population control policies have been in place in China for a number of years. Overall, the evidence submitted together with the respondent's motion to reopen does not reflect a recent material change in the conditions in his native China. Moreover, a change in the respondent's personal circumstances in the United States does not serve as an adequate basis for granting his untimely motion to reopen. *See Guan v. BIA*, 345 F.3d 47 (2nd Cir. 2003). In view of the foregoing, the following order shall be entered.

ORDER: The respondent's motion to reopen is denied.

s/ Frederick D. Hess
FOR THE BOARD